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Appellee's Brief 1976-SC-0226

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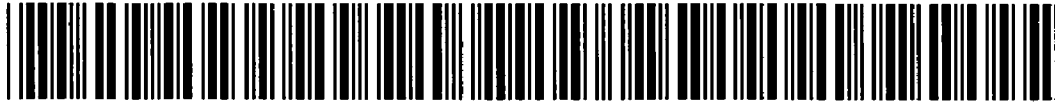
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KYSC1976-SC-0226-02

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APPELLEE'S BRIEF

J S 2 20 667

SUPREME COURT OF KENTUCKY

File No. 76-226

MARTHA JEAN EDWARDS - - - Appellant

versus

ARLAN'S DEPARTMENT STORES, INC.,
AMERICAN MUTUAL INSURANCE COM-
PANIES,

JAMES R. YOCOM, Commissioner of Labor of
the Commonwealth of Kentucky and Cus-
todian of the Special Fund, and

WORKMEN'S COMPENSATION BOARD OF
KENTUCKY - - - Appellees

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS A. BALLANTINE, JR., JUDGE

BRIEF FOR APPELLEES, ARLAN'S DEPARTMENT
STORES, INC., AND AMERICAN MUTUAL
INSURANCE COMPANIES

FILED

MAY 7 1976

WILLIAM D. GRUBBS

DAVID C. BROWDER

WOODWARD, HOBSON & FULTON

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT,

1805 Kentucky Home Life Building
Louisville, Kentucky 40202

Attorneys for Appellees

This is to certify that pursuant to RAP 1.250 a copy of the within Brief has been served by mail on Honorable Armer H. Mahan, Davis & Mahan, 310 W. Liberty Street, Louisville, Kentucky, Attorney for the Appellant, Martha Jean Edwards; Honorable William L. Huffman, Director, Workmen's Compensation Board, Department of Labor, Frankfort, Kentucky, 40601; Honorable Louis G. Mayer, Department of Labor, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky, 40202; Honorable Kenneth E. Hollis, Department of Labor, Frankfort, Kentucky, 40601; and Honorable Thomas A. Ballantine, Jr., Judge, Jefferson Circuit Court, Louisville, Kentucky, 40202, this ____ day of May, 1976.


Counsel for Appellees

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STATEMENT OF THE QUESTION PRESENTED

Was the Circuit Court Correct in Setting Aside the Opinion and Award of the Workmen's Compensation Board in That It Failed to Separate the Two Distinct Injuries to the Plaintiff, and Failed to Apportion Liability for the Plaintiff's Disability Between the Employer and the Special Fund Under KRS 342.120?

Appellees, Arlan's Department Stores, Inc., and American Mutual Insurance Companies, Believe that the Question Presented Should Be Answered "Yes," and That the Judgment Be Affirmed.

SUPREME COURT OF KENTUCKY

File No. 76-226

MARTHA JEAN EDWARDS - - - - *Appellant*

v.

ARLAN'S DEPARTMENT STORES, INC.,
AMERICAN MUTUAL INSURANCE COMPANIES,
JAMES R. YOCOM, Commissioner of Labor
of the Commonwealth of Kentucky and
Custodian of the Special Fund, and
WORKMEN'S COMPENSATION BOARD OF KEN-
TUCKY - - - - - *Appellees*

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS A. BALLANTINE, JR., JUDGE

BRIEF FOR APPELLEES, ARLAN'S DEPARTMENT STORES, INC., AND AMERICAN MUTUAL INSURANCE COMPANIES

May it please the Court:

COUNTERSTATEMENT OF THE CASE

A. Nature of the Proceedings

B. Statement of the Facts

Appellant, Martha Jean Edwards, moved to consolidate this action with Appeal No. 76-149 (James R. Yocom, Commissioner of Labor, etc. v. Martha

Jean Edwards, et al.) which motion has been sustained by this Court. Accordingly, Appellees, Arlan's Department Stores, Inc., and American Mutual Insurance Companies, incorporate into this action its Counter-statement of the Case both as to the Nature of the Proceedings and as to the Statement of the Facts, as set forth in its Brief filed before this Court in the consolidated Action No. 76-149.

ARGUMENT

The Circuit Court was Correct in Setting Aside the Opinion and Award of the Workmen's Compensation Board in That It Failed to Separate the Two Distinct Injuries to the Plaintiff, and Failed to Apportion Liability for the Plaintiff's Disability Between the Employer and the Special Fund Under KRS 342.120.

The medical evidence is undisputed that the Plaintiff sustained two separate work-related injuries, sustaining an initial injury on August 12, 1971, and sustaining a second injury in May of 1972. Moreover, all of the medical evidence clearly establishes that the Plaintiff would not have sustained any permanent disability as a result of the second or subsequent accident had there been no pre-existing disability arising out of the accident of August of 1971. Under KRS 342.120(3) & (4) the Special Fund is liable for any further permanent disability attributable to the second accident of May of 1972, *Young v. Fulkerson*, Ky., 463 S. W. 2d 118 (1971).

The decision of the Circuit Court, in reversing the Opinion and Award of the Workmen's Compensation

Board, did not set aside the finding of disability, but did correctly set aside the finding that there had been only one injury to the Plaintiff, and to that extent the Opinion and Award was set aside. The Circuit Court determined that the Opinion and Award of the Workmen's Compensation Board failed to separate the two distinct injuries occurring to the Plaintiff, and therefore failed to apportion the liability for the Plaintiff's disability between the employer and the Special Fund under KRS 342.120(3) & (4). The decision of the Circuit Court, in reversing such an Opinion and Award, is correct and must be sustained. Under KRS 342.120(3) & (4), the employer is liable only for the Plaintiff's disability attributable to the accident and injury of August 12, 1971, the Special Fund is responsible for the additional disability resulting from the accident and injury in May of 1972, since the medical proof is undisputed that but for the injury of August 12, 1971, the Plaintiff would not have sustained any permanent disability as a result of the injury of May of 1972.

CONCLUSION

For the foregoing reasons, the Appellees, Arlan's Department Stores, Inc., and American Mutual Insurance Company, respectfully submit that the judgment of the Jefferson Circuit Court setting aside the Opinion and Award of the Workmen's Compensation Board should be affirmed.

Respectfully submitted,

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